Supreme Court, U.S.
FILED

No. 01-720 JUL 05 2001

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In The

Supreme Court of the United States

WILLIAM LARRY LOWE,

Petitioner,

v.

STATE OF IOWA,

Respondent.

On Petition For Writ Of Certiorari To The Iowa Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether warrantless search of Petitioner's residence violates Fourth Amendment's prohibition against unreasonable searches and seizures when consent to search was involuntary through police officer coercion.

LIST OF ALL PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1) William L. Lowe

2) State of Iowa, Attorney General

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OPINIONS AND ORDERS BELOW

The following orders and opinions have been entered by the courts below:

1. On November 9, 1999 Petitioner was found guilty of manufacture of marijuana after a bench trial before the Honorable Daniel P. Wilson.

2. Order of the Court of Appeals of Iowa Affirming Petitioner's conviction on January 24, 2001, as an unpublished opinion (App. 1-1).

3. Order of the Iowa Supreme Court denying Petitioner's Application for Further Review on April 6, 2001, and is an unpublished opinion (App. 2-1).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The date on which the Court of Appeals of Iowa decided the case was January 24, 2001 (*See* App. 1).

A timely Application for Further Review was filed and thereafter denied on April 6, 2001 (*See* App. 11).

The jurisdiction of this Court is invoked under U.S. CONST. Art. III, § 2, cl. 1 which states that the judicial power shall extend to all cases in law and equity arising under the Constitution.

Petitioner herewith files a timely Writ of Certiorari to the United States Supreme Court within 90 days of a final judgment or decision issued by the Iowa Supreme Court.

CONSTITUTIONAL PROVISIONS

Petitioner hereby asserts that the issues raised herein invoke the Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This Appeal is based on the State of Iowa's prosecution of Petitioner William Larry Lowe for the manufacture of marijuana and failure to affix a drug tax stamp. A trial was held in the Iowa District Court in and for Jefferson County, where the Honorable Daniel P. Wilson found Petitioner guilty as charged in the Trial Information filed by the Jefferson County Attorney (App. 2). The Iowa Court of Appeals affirmed the conviction on January 24, 2001 (App. 1). On April 6, 2001, the Iowa Supreme Court denied a timely Application for Further Review (App. 11). Petitioner asserts the lower courts erred because the record establishes he was coerced into consenting to a search of his residence. Consequently, the warrantless search was unconstitutional under the Fourth Amendment, and all evidence seized should have been suppressed.

On or about May 24, 1999 Officer Greg Francisco received an anonymous tip that Petitioner was growing marijuana plants in his home (App. 2). The next day, Francisco arrived at Petitioner's home and knocked on the door (App. 2). Petitioner came outside and shut the door behind him (App. 2). Francisco indicated that he knew Petitioner was growing marijuana in the closet (App. 2). Francisco spent approximately 45 minutes

attempting to gain permission to search the premises (App. 2). The Officer also told Petitioner that if he consented to a search he would not be arrested that day, but if the officer had to obtain a search warrant he *would* be arrested that day (App. 5).

Officer Francisco also indicated that while he obtained a search warrant, Petitioner would not be allowed to re-enter his residence (App. 5). Petitioner was told that additional officers would be called to secure the home until a search warrant was issued (App. 5). Petitioner eventually acquiesced by allowing Francisco to search the residence (App. 5). Francisco retrieved a consent form from his vehicle (App. 5). Petitioner walked into his home and Francisco followed (App. 5). Petitioner showed the officer a closet containing four marijuana plants growing under an artificial light (App. 5). At that time, Francisco again requested that Petitioner sign the consent form (App. 5). Francisco insisted that he could either handle Petitioner with kid gloves or he would call in the boys in blue. Based upon this obvious threat with the absolute power to execute the ultimatum, Petitioner signed the consent form, but added the words, "under duress," to document the involuntariness of the consent (App. 5, 17).

REASONS FOR GRANTING THE WRIT

Petitioner Lowe requests this Court to grant the Writ of Certiorari for the following reason: The District Court failed to suppress evidence that was obtained in violation

of Petitioner's Fourth Amendment right against unreasonable search and seizure.

Petitioner argues that the Iowa Court of Appeals and Iowa Supreme Court failed to reverse Petitioner's conviction and remand to District Court because the consent given to the warrantless search was involuntarily due to law enforcement coercion, and therefore constitutes an unconstitutional search and seizure in violation of the Fourth Amendment to the United States Constitution.

ARGUMENT AND AUTHORITY

Warrantless Search of Petitioner's Residence Violates Fourth Amendment's Prohibition Against Unreasonable Search and Seizure When Ultimatum Effectively Eliminates Voluntariness of Consent to Search

Standard of Review: The question presented for review involves whether Constitutional rules pertaining to the Fourth Amendment were correctly interpreted and applied to the facts. In the application of a Constitutional standard to the facts of a particular case, *de novo* review is appropriate. *United States v. Bajakajian*, 524 U.S. 321, 337 n.10 (1998). Questions of Constitutional fact compel this Court's *de novo* review. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 509 n.27 (1984).

Discussion: The Fourth Amendment to the United States Constitution, states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

> probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. Amend. IV.

The Fourth Amendment protects people against unreasonable searches and seizures. Evidence obtained in violation of the Fourth Amendment must be suppressed and held inadmissible.

Petitioner can properly rely on the Fourth Amendment to suppress evidence discovered during an unconstitutional search. The question in this case is whether there was a valid exception to the warrant requirement.

Warrantless searches and seizures are per se unreasonable unless they fall under one of the recognized exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967). The State has the burden of showing that the officer acted reasonably under one of the following exceptions: (1) consensual search; (2) probable cause coupled with exigent circumstances; or (3) plain view doctrine. *Id.*

The Fourth Amendment's purpose is to protect and safeguard the privacy and security of individuals against arbitrary invasion by government officials. *Michigan v. Tyler*, 436 U.S. 499, 502 (1978). The State must prove by a preponderance of the evidence that one of the few carefully drawn exceptions to the warrant requirement existed to allow the police to enter without a warrant. *Id.*

In this case, Officer Greg Francisco obtained consent from Petitioner Lowe to search the premises (App. 5, 17).

Lowe contends that the consent was coerced and therefore invalid, resulting in an illegal search and seizure of the property.

Consent to a search must be unequivocal, specific, and offered freely and intelligently. The State must prove that the consent was free from duress or coercion. When questions of voluntariness are raised, an examination of the totality of the circumstances is made. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973).

Petitioner contends that his consent was coerced by Francisco's insistence upon obtaining a search warrant and threatening to arrest Petitioner if he did not consent to the search (App. 5). "An officer's threat to obtain a search warrant is a factor to be considered when examining the totality of the circumstances surrounding consent." *United States v. Larson*, 978 F.2d 1021, 1024 (8th Cir. 1992).

The State's burden to prove that consent was freely and voluntarily given cannot be discharged by showing mere acquiescence to a claim of lawful authority. *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968). According to the *Bumper* Court:

> When a law enforcement officer claims authority to search a home under a warrant . . . or threatens to obtain a search warrant . . . or makes a flat assertion that he has come to search . . . he announces in effect that the occupant has no right to resist the search. Where there is coercion there cannot be consent. *Id.* at 550.

In the case at bar, Petitioner was informed that he would not be allowed to enter his home until several officers

secured the house while a search warrant was obtained, and if he refused consent, Petitioner would be arrested after the search (App. 5). The entire conversation lasted 45 minutes with Petitioner standing outside his back door (App. 2, 5). The discussion finally ended when Petitioner acquiesced to what he perceived, due to the officer's prompting, as an inevitable search. Petitioner's belief that the search was coerced is unequivocally documented on the written consent form where he wrote that the consent to search was "under duress" (App. 5, 17). Based on the tactics employed by Officer Francisco – threatening immediate arrest for withholding consent and indicating a search warrant would be obtained – Petitioner was intimidated into believing that he had no alternative course of action; except to acquiesce in the face of the officer's representation of lawful authority.

The tactics employed by Officer Francisco in tacitly suggesting that resistance to a search would be futile is tantamount to claiming authority under a warrant. In *United States v. Faruolo*, 506 F.2d 490 (9th Cir. 1980), the Second Circuit pointed out the coercion involved in such tactic:

> Even more significant is the finding that the officers represented to the owner that objection to their entry would be futile, since they could get a search warrant and return, and that this might be embarrassing for her. At the very least the statement failed to convey to the lay person that the issuance of a search warrant involves the exercise of discretion and judicial power, and is not a mere ministerial act. *Id.* at 495-98.

The intimation that a warrant will automatically issue is as inherently coercive as the announcement of an invalid warrant. *Id.*

In *United States v. Ocheltree*, 622 F.2d 992 (9th Cir. 1980), DEA agents stopped the defendant at the airport, and accompanied the officer to his office. Although the officer advised him that he was under no obligation to permit a search, he stated that if permission were denied, he would *attempt* to get a warrant. *Id.* at 933. The court found that the consent was not voluntary:

> When the agent informed Petitioner that if consent was not forthcoming he would attempt to secure a search warrant, there was a clear implication that Petitioner would be retained in custody until the warrant was obtained. *Id.* at 994.

These cases demonstrate that the coercive tactics employed by officer Francisco – indicating that a warrant would inevitably be obtained, that Petitioner would not be free to enter his home until the lengthy process of obtaining a warrant was finished, and threatening to arrest Petitioner following a very public search – effectively vitiated the voluntariness of his consent.

Petitioner was threatened with an embarrassing search. He was threatened with an inevitable arrest following the search. Petitioner was informed that he would not be able to go back into the house until a search warrant was obtained. He was not properly informed that obtaining a warrant is subject to the discretion of a Magistrate who impartially assesses the issue of probable cause, and is not merely dependent on the whim of an officer. Petitioner understood the officer's statement to

mean that he was certain to get a search warrant, so there would be no point in denying consent.

Based on the case law cited hereinabove, Petitioner's consent was not given freely and voluntarily. The circumstances under which he gave consent were rife with coercion, and in his own words at the scene, Petitioner consciously printed on the consent form that his consent was given under duress (App. 5, 17).

An unlawful search taints all evidence obtained. Absent consent, the warrantless search was illegal, therefore all evidence obtained as a result of the search was tainted and inadmissible. The purpose behind the poisonous tree doctrine is to deter police conduct that focuses upon obtaining incriminating evidence against a suspect without regard to his constitutional or statutory rights. *Nix v. Williams*, 467 U.S. 431, 442-43 (1984).

The District Court erred in concluding that the officer's presence in Petitioner's home was lawful, and therefore the discovery of marijuana was lawful. An unlawful search taints all evidence obtained in the search or any leads uncovered by the search. *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). The information and evidence obtained through the search of Petitioner's residence was unlawful and the fruits of that search should have been suppressed. Therefore, the trial court erred in denying Petitioner's motion to suppress all evidence obtained through the search of his residence.

CONCLUSION

For all the reasons set forth herein, Petitioner requests this Court to grant the Writ of Certiorari, reverse the conviction, enter an order suppressing all evidence obtained against Petitioner, and remand for further proceedings.

Respectfully submitted,

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IN THE COURT OF APPEALS OF IOWA

No. 0-725 / 99-2048

Filed January 24, 2001

STATE OF IOWA,

Appellee,

vs.

WILLIAM LARRY LOWE,

Appellant.

Appeal from the Iowa District Court for Jefferson County, James P. Reilly and Daniel P. Wilson, Judges.

Defendant appeals following his convictions for manufacture of marijuana and failure to affix a drug tax stamp. AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, and Timothy W. Dille, County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Miller, JJ.

VOGEL, J.

William L. Lowe appeals following his convictions for manufacture of marijuana and failure to affix a drug tax stamp. We find Lowe failed to establish his trial counsel provided ineffective assistance and, therefore, we affirm.

Background facts. On May 24, 1999, Officer Greg Francisco received an anonymous tip advising him that Lowe was growing marijuana in his home and the location of the plants within the residence. The next day, Officer Francisco went to Lowe's home and knocked on the door. When Lowe answered the door, he conversed with Officer Francisco outside of the house for about forty-five minutes before agreeing to allow the officer to search the premises. Officer Francisco seized four marijuana plants.

Prior to trial, Lowe's attorney filed a motion to suppress the evidence, alleging entry into the home was not consensual. Although the motion was untimely the trial court overruled it on the merits and the seized evidence was admitted at trial. Lowe waived a jury trial and was convicted of manufacture of marijuana in violation of Iowa Code sections 124.204(4)(m) and 124.401(d) (1999) and failure to affix a drug tax stamp in violation of Iowa Code sections 453B.1(3)(c) and 453B.12 (1999). He now appeals claiming his counsel was ineffective.

Scope of review. Ineffective assistance of counsel claims are generally preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885, 890 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180, 191-92 (Iowa App. 1987). We depart from this preference, however, if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. Id. To prevail on his claim of ineffective assistance of counsel, the defendant must ultimately show that his attorney's performance fell outside a normal range of competency and that the deficient performance so prejudiced him as

to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. State v. McKettrick, 480 N.W.2d 52, 55 (Iowa 1992). Representation is presumed competent and a defendant has the burden to prove by a preponderance of the evidence that counsel was ineffective. Id.

Waiver of jury trial. Lowe contends his attorney was ineffective for failing to establish, on the record, that Lowe's waiver of his right to a jury trial was done voluntarily and intelligently. Iowa Rule of Criminal Procedure 16(1) states:

> Cases required to be tried by jury shall be so tried unless the defendant voluntarily and intelligently waives a jury trial in writing and on the record . . .

Submitted to the court was a written waiver, signed by both Lowe and his attorney, stating, "The defendant herein hereby waives his right to a jury trial in the above-referenced cause." Additionally, before the trial, the court inquired as to whether Lowe consented to the waiver of a jury trial in the following colloquy:

> The Court: [T]he file also reflects a written waiver of jury trial, filed November 4, 1999, which appears to have been signed by Defendant Lowe and his attorney Mr. Small.
>
> Pursuant to Iowa Rule of Criminal Procedure 16, Mr. Dille, do you agree and consent to the waiver of jury trial at this stage by the defendant?
>
> Mr. Dille: Yes, I do, Your Honor.

> The Court: Mr. Small, does the Defendant consent to waiver of jury trial concerning this matter?
>
> Mr. Small: Yes, Your Honor.
>
> The Court: Is that correct, Mr. Lowe?
>
> The Defendant: Yes, sir.

The present case is similar to State v. Lawrence, 344 N.W.2d 227, 230 (Iowa 1984), in which the defendant filed a written waiver of a jury trial, signed by himself and his attorney, and made no challenge thereto until the trial court rendered a guilty verdict. In that case, the supreme court found "[a] written jury waiver taken in compliance with rule 16(1) is prima facie evidence that the waiver was voluntary and intelligent." Id.; see also State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994). Similarly, Lowe does not suggest why the waiver was involuntary, but merely asserts his attorney failed to prove on the record that it was voluntary and intelligent. On our review of the record, containing his written document and comments to the trial court, Lowe failed to meet his burden of proof to refute the voluntary nature of the waiver. Therefore, we find Lowe's attorney did not breach a duty to Lowe.

Motion to suppress. Lowe failed to timely file his motion to suppress before the trial court. This action was contrary to Iowa Rule of Criminal Procedure 10(4), requiring motions to be filed within forty days of arraignment. Without a showing of good cause, this error is fatal to his motion. Although the trial court decided the motion on the merits, we can affirm on any basis, including the tardiness of the motion. Therefore, Lowe contends

his attorney was ineffective in failing to timely file the motion to the trial court.

We begin by a review of the merits of the motion to suppress. Both the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution protect against unreasonable searches and seizures by government officials. State v. Canas, 597 N.W.2d 488, 492 (Iowa 1999). "A search and seizure without a valid warrant is per se unreasonable unless it comes within a recognized exception such as consent, search incident to arrest, probable cause and exigent circumstances, or plain view." State v. Manna, 534 N.W.2d 642, 644 (Iowa 1995).

Lowe asserts Officer Francisco's entry into his home was illegal, as the consent was not voluntarily or intelligently given but was coerced. During his testimony, Officer Francisco outlined the facts surrounding his perceived consent to enter Lowe's residence. He stated he arrived and knocked on the door, hoping to talk to Lowe and gain consent to search the premises. Officer Francisco confronted Lowe with his suspicions and asked to speak to him. Lowe stepped outside, closing the exterior door behind him. They spoke for approximately forty-five minutes, during which time Lowe told Officer Francisco about his prior drug use, including heroine and marijuana. He then explained several of the benefits and uses for marijuana and his views on the legalization of marijuana. Officer Francisco approached the subject of a consent search and Lowe attempted to formulate other options, including a hypothetical in which, if given thirty minutes, he would bring out the contraband and turn it over to the officer. Officer Francisco refused this offer,

telling Lowe if consent was given to search the premises, he would not have to arrest him at that time. Officer Francisco explained at trial he made this offer for several reasons, including the time needed to process the plants to verify their illegal nature and the possibility of Lowe cooperating in further drug investigations. When Lowe rejected the offer, Officer Francisco explained the only remaining option was to obtain a search warrant to retrieve the contraband and secure the home in the meantime, with Lowe remaining outside the residence to avoid destruction of evidence. He further alerted Lowe that, if they found illegal substances in the home, he would have to arrest Lowe at that time. Officer Francisco handed Lowe a form for consent to search and Lowe led the officer into the house, showing him the growing marijuana plants. Lowe then signed the consent to search form, adding the words "under duress."

Lowe now contends the consent was coerced because it was made under the threat of Officer Francisco being allowed to enter or securing the home and obtaining a search warrant. The supreme court has previously stated:

> A search to which an individual consents comports with the requirements of the Fourth Amendment. Consent given to a search must be unequivocal, specific, and freely and intelligently given. The question of voluntariness of consent is one of fact, and the State must prove the alleged consent by a preponderance of the evidence.

State v. Howard, 509 N.W.2d 764, 767 (Iowa 1993).

Lowe compares this situation to one decided by the Supreme Court in Bumper v. North Carolina, 391 U.S.

543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968), in which officers asserted authority to enter the premises under a search warrant later discovered to be fatally flawed. The officers then attempted to rely on the consent gained after the search warrant was presented to the homeowner. Bumper, 391 U.S. at 548-49, 88 S. Ct. at 1792, 20 L. Ed. 2d at 802. Lowe misinterprets the holding of Bumper when he extends the court's language to include a threat to obtain a search warrant. Id. at 550, 88 S. Ct. at 1792, 20 L. Ed. 2d at 802-03.

During Officer Francisco's conversation with Lowe, he obtained the necessary probable cause to seek a search warrant. However, after Lowe volunteered information regarding his views of marijuana and his willingness to bring the contraband out to Officer Francisco, he could not be expected to allow Lowe to return into the home to potentially dispose of the illegal drugs while he sought out a magistrate to issue a search warrant. We find Officer Francisco accurately informed Lowe of his options regarding the confiscation of the illegal narcotics present in his home and, therefore, his consent was not coerced but was voluntarily and intelligently given.

Because we agree with the trial court that the search was valid under the consent exception to the warrant clause, Lowe's attorney did not fail to perform a necessary duty by the late filing of the motion to suppress. Accordingly, we affirm.

AFFIRMED.

Streit, J. concurs; Miller, J. concurs in part and dissents in part.

MILLER, J. (concurring in part and dissenting in part)

I concur in part, but respectfully dissent in part and dissent from the result.

Waiver of Jury Trial. I concur in the resolution of this claim against Lowe, but do so for a somewhat different reason. Unless Lowe's waiver of his right to jury trial was in fact not voluntarily or not intelligently made, there can be neither a breach of duty by counsel nor prejudice to Lowe. Lowe makes no claim that his waiver was in fact not voluntary and intelligent, and thus makes no claim of ineffective assistance that we could resolve in his favor or preserve for a possible postconviction proceeding.

Motion to Suppress. The majority resolves this part of an ineffective assistance claim by addressing the merits of a suppression motion and concluding that the trial court correctly denied the motion because Lowe voluntarily consented to a search of his home. Whether the suppression issue is decided under the guise of an ineffective assistance claim or is decided directly on its merits, I cannot agree that the State has proved Lowe consented to the search.

The burden is on the State to prove by a preponderance of the evidence the voluntary nature of a consent to search. State v. Garcia, 461 N.W.2d 460, 462 (Iowa 1990). When reviewing the question of voluntariness we review the evidence de novo and make an independent evaluation of the totality of the circumstances to determine whether the consent was voluntary. Id. Mere acquiescence to asserted authority is insufficient to show voluntariness of consent. State v. Ahern, 227 N.W.2d 164,

166 (Iowa 1975) (citing Bumper v. North Carolina, 391 U.S. 543, 548-49, 99 S. Ct. 1788, 1792, 20 L. Ed. 2d 797, 802 (1968)).

During their conversation, Officer Francisco told Lowe that if Lowe consented to a search of his home Francisco would not charge or arrest him that day. Lowe asked Francisco what would happen if Lowe didn't consent to a search. Francisco responded that he would "go get a search warrant," that he would call in other officers to restrain Lowe from entering his home until he got the warrant, that it might take several hours to get the warrant, and that if he were required to get a warrant he would arrest Lowe that day.

It is important to note that Francisco did not tell Lowe that he would seek a warrant, that he would try to get a warrant, that he might not be able to get a warrant, or even that someone else would determine whether a warrant would be issued. He quite simply and plainly told Lowe that he would obtain a search warrant. Francisco in essence told Lowe that Lowe's home would be searched, whether or not Lowe consented, pursuant to a warrant if he did not consent.

Upon our de novo review I would hold that under the totality of the circumstances the State has failed to prove that Lowe's consent was voluntary. His consent was granted only in submission to a claim of lawful authority to search, Francisco's assertion that if Lowe did not consent Francisco could and would get a warrant and search anyway. See, e.g., Dotson v. Somers, 402 A.2d 790, 794 (Conn. 1978) (holding that consent to search was not shown to be voluntary where officers represented that

objection to entry would be futile because they could get a warrant and return).

IN THE SUPREME COURT OF IOWA

No. 99-2048

Jefferson County No. FECR003140

ORDER

STATE OF IOWA,

Appellee,

vs.

WILLIAM LARRY LOWE,

Appellant.

After consideration by this court en banc, further review of the above captioned case is denied.

Dated this 6th day of April, 2001.

THE SUPREME COURT OF IOWA

/s/ Louis A. Lavorato, Chief Justice

RULING ON MOTION TO SUPPRESS

Filed 10/18/99

IN THE IOWA DISTRICT COURT
FOR JEFFERSON COUNTY

STATE OF IOWA,	NO. FECR003140
vs.	**RULING ON DEFENDANT'S MOTION TO SUPPRESS**
WILLIAM LARRY LOWE,	
Defendant.	

On September 13, 1999, the Defendant filed his Motion to Suppress which is resisted by the State. A hearing was held with regard to this motion on the 11th day of October, 1999, and at the conclusion of the hearing the Court took this matter under advisement.

At the hearing held on this matter, the Court was presented with Plaintiff's Exhibit 1, which is a permission to search which was signed by the Defendant on the 25th of May, 1999, and Defendant's Exhibit 2, which is the deposition of Officer Greg Francisco of the Fairfield Police Department.

From the evidence submitted to the Court, the Court makes the following

FINDINGS OF FACT

Officer Francisco testified that just prior to the 25th of May, 1999, he got a telephone call in which he had an

anonymous male caller tell him the Defendant was growing marijuana in the house and it was in the closet. He gave Francisco a description of the house and the house address, a description of the car and a description of where the plants were located in the house.

Officer Francisco testified that he did not believe that he had sufficient grounds to get a search warrant based upon information that he had received in the telephone call and that he therefore did on the 25th of May visit the residence of the Defendant. The express purpose was to conduct a "knock and talk" interview with the Defendant and confront him with information that he had received from an anonymous caller the previous day. Francisco stated that he intended to try and obtain consent from the Defendant to search the residence.

The evidence shows that the Defendant answered the door in response to Francisco's knock and Francisco immediately confronted the Defendant, informing him that he knew the Defendant was growing marijuana in his closet and asking what they were going to do about it. Thereafter, a lengthy discussion took place between the Defendant during which Francisco promised the Defendant that if he would give consent for the search, he would not be arrested on that day. Francisco further stated that if he didn't get consent to search that he would have to call in officers to secure the house while Francisco went and obtained a search warrant which would take two or three hours. He stated that the police would require that the Defendant stay outside of the house during this time period. Defendant was told by Francisco that if additional officers had to be called in, authorities would be looking for the results for the

amount of money that would have been expended in securing the search and therefore the Defendant would have to be arrested on that day.

During the interview, Francisco began to believe that he was not going to obtain consent and informed the Defendant that he knew where things were going and that he was going to have to start calling officers. At that point the Defendant said he would take Francisco inside. The Defendant walked to the police car and Francisco got a consent form. Francisco attempted to read the form to the Defendant who immediately took Francisco inside and showed him the marijuana plants. Defendant then sat on his bed and Francisco presented the Defendant with the consent form. Defendant read and signed the form and wrote the words "under duress" on the form. Francisco asked the Defendant what he meant by that, and the Defendant said it was duress because Francisco told him he could "either handle him with kid gloves or call in the boys in blue."

The Defendant contends that he was threatened with having his residence surrounding by law enforcement and himself detained publicly and being arrested that day or giving consent to the search of his residence. He contends that under these circumstances, the consent obtained from law enforcement was not one that was made as the result of a free and unconstrained choice.

From the foregoing findings of fact, the Court reaches the following

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CONCLUSIONS OF LAW

Based upon the totality of the circumstances, the Court concludes that the search which was based upon the consent by the Defendant was valid. It is without dispute that after the Defendant was informed that he could either consent to a search or that the house would be secured and that the search warrant would be obtained that he gave voluntary consent to have the house searched and he showed the officer where the marijuana was located. The Defendant did further execute the permission to search form which he acknowledged it was his constitutional right not to have a search made of the premises and property owned by him or under his care, custody and control, without a search warrant. He further stated that knowing of his lawful right to refuse to consent to such a search, that he willingly gave permission to Officer Francisco to conduct a complete search of the premises and property, including all buildings and vehicles, both inside and outside of the property located at 803 West Stone, Fairfield, Iowa. (See Defendant's Exhibit 1.).

In addition to signing the consent to search form, the Defendant's voluntariness was exhibited by his cooperation with Officer Francisco. The Defendant was forthright with Officer Francisco, taking him into the house and showing him exactly where the marijuana plants were located. This is analogous to the fact situation in the case of *State v. Garcia*, 261 N.W.2d 460 (Iowa 1990).

Based upon the foregoing, it is the conclusion of the Court that the Defendant's Motion to Suppress should be and is hereby overruled.

Dated: October 15, 1999.

/s/ James P. Rielly

Judge, 8th Judicial District of Iowa

CONSENT TO SEARCH FORM

PERMISSION TO SEARCH

I, Larry Lowe, Have been informed by Officer Greg Francisco who made proper identification as authorized law enforcement officer(s) of the Fairfield Police Department, of my CONSTITUTIONAL RIGHT not to have a search made of the premises and property owned by me and/or under my care, custody and control, without a search warrant. [handwritten "Under duress"]

Knowing of my lawful right to refuse to consent to such a search, I willingly give my permission to the above named officer(s) to conduct a complete search of the premises and property, including all buildings and vehicles, both inside and outside of the property located at 803 W. Stone, Fairfield, Iowa.

The above said officer(s) further have my permission to take from my premises and property, any letters, papers, materials or any other property or things which they desire as evidence for criminal prosecution in the case or cases under investigation.

This written permission to search without a search warrant is given by me to the above named officer(s) voluntarily and without any threats or promises of any kind, at 9:46 o'clock A.M., on this 25 day of May 1999, at ___

/s/ W. Larry Lowe

Witness: /s/ Greg Francisco

Address: F.P.D.